UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

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| UNITED STATES OF AMERICA<br>Complainant, | ) | |
| v. | ) | 8 U.S.C. § 1324a Proceeding<br>Case No. 94A00215 |
| ADVANCED AIR CONDITIONING INC. and JOHN C. AGUADA, Individually<br>Respondent. | ) | |

**FINAL DECISION AND ORDER**
(June 7, 1995)

**MARVIN H. MORSE**, Administrative Law Judge

Appearances: Dayna M. Diaz, Esq.
for Complainant

Gerhard Frohlich, Esq.
for Respondent

## I. PROCEDURAL HISTORY

On December 27, 1994, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint against Advanced Air Conditioning, Inc. and John C. Aguada (AAC or Respondent) alleging violations of 8 U.S.C. § 1324a(a)(1)(B) in the Office of the Chief Administrative Hearing Officer (OCAHO). Attached to the Complaint was a Notice of Intent to Fine (NIF) dated October 20, 1994.

Count I of the Complaint charges Respondent with failing to prepare the employment eligibility verification form (Form I-9) for 13 named individuals; the civil money penalty is $5,980 ($460 for each individual). Count II charges Respondent with failing to prepare properly section 2 of the Form I-9 for six named individuals; the civil money penalty is $2,760 ($460 for each individual). Count III charges Respondent with failing to ensure that employees properly completed section 1 of the Form I-9 for three named individuals; the civil money penalty is $1,380 ($460 for each individual). Count IV charges Respondent with failing to complete properly sections 1 and 2 of the Form I-9 for two named individuals; the civil money penalty is $920 ($460 for each individual). The total civil money penalty requested is $11,040.

On December 30, 1994, OCAHO issued its Notice of Hearing which transmitted the Complaint to Respondent.

The Answer to the Complaint, filed February 21, 1995, appeared to acknowledge liability, asking that the judge "determine an appropriate civil money penalty for the admitted violations." By Order dated March 6, 1995, I noted that

> the only issue before me appears to be the adjudication of the quantum of penalty. Accordingly, this Order inquires whether either party requests a confrontational, evidentiary hearing on the civil money penalty or, alternatively, is prepared to submit the question for disposition on a paper record to consist of memoranda, with supporting documentation.

The parties advised that they were prepared to submit the question of an appropriate civil money penalty on a paper record. Accordingly, by Order dated April 3, 1995, reciting that Respondent "admits to liability on all four counts of the Complaint," a briefing schedule was set to resolve the issue of quantum of civil money penalty. Complainant's brief was filed on May 30, 1995 and Respondent's brief was filed on June 5, 1995.

## II. CIVIL MONEY PENALTY ADJUDGED

### A. Introduction

The statutory minimum for the civil money penalty is $100; the maximum is $1000. 8 U.S.C. § 1324a(e)(5). Since the record does not disclose facts not reasonably anticipated by INS in assessing the penalty, I have no reason to increase the penalty beyond the amount assessed by INS. See United States v. Williams Produce, 5 OCAHO 730 (1995), appeal filed, No. 95-8316 (11th Cir. Mar. 20, 1995); United States v. DuBois Farms, Inc., 2 OCAHO 376 (1991); United States v. Cafe Camino Real, 2 OCAHO 307 (1991). I will therefore only consider the range of options between the statutory minimum and the amount assessed by INS in determining the reasonableness of INS' assessment. See United States v. Tom & Yu, 3 OCAHO 445 (1992); United States v. Widow Brown's Inn, 3 OCAHO 399 (1992).

Five statutory factors must be taken into consideration in determining reasonableness of the civil money penalty. The factors are: "the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations." 8 U.S.C. § 1324a(e)(5). In weighing each of these factors, I utilize a judgmental and not a formula approach. See United States v. King's Produce, 4 OCAHO 592 (1994); United States v. Giannini Landscaping, Inc., 3 OCAHO 573 (1993). In this way, each factor's significance is based on the facts of a specific case. Williams, 5 OCAHO 730 at 5.

B. Factors Applied

1. Size of Business

"OCAHO caselaw has consistently held that where a business is 'small', the civil money penalty is to be mitigated." United States v. Raygoza, 5 OCAHO 729 (1995). Respondent asserts that it is

> a relatively small, local air conditioning service company, owned by an individual, who is also named as a Respondent. The company has approximately 15 employees, including the owner and his daughter. The company has assets worth approximately half a million dollars and achieves annual gross sales of approximately $2 million dollars.

Respondent's Brief at 2.

Although Complainant does not conclude that AAC is a small business, it states that "as a matter of discretion [it] did not increase the civil monetary penalty for the size of business factor." Complainant's Brief at 4. Complainant notes that John C. Aguada, named as a Respondent, "owns all the shares in the corporation . . . [and is] president, treasurer and director. . . ." Respondent's Brief at 3.

I agree with Complainant that the factor of size should not be used to aggravate this civil money penalty. Beyond that, I find that Respondent is a small business and that to that extent the civil money penalty should be mitigated.

2. Good Faith of Employer

Complainant correctly states that "[i]n order to show a 'lack of good faith' for the purpose of aggravating the penalty amount, OCAHO has held that a complainant must demonstrate culpable behavior beyond mere ignorance on the part of the respondent." Complainant's Brief at 4 (citing United States v. Wagco Security Services, 2 OCAHO 478 (1992); United States v. O'Brian Oil Co., 1 OCAHO 166 (1990)). See also Raygoza, 5 OCAHO 729 at 7. INS asserts that it used this factor to aggravate the penalty because Respondent "presented I-9 forms for some employees and not for others . . ." and therefore was not ignorant of its obligation under § 1324a. Complainant's Brief at 4. Furthermore, Complainant states that "the [INS] investigation reveals that respondent may have been assisting an unauthorized alien to evade detection, which would necessarily have involved falsification of business records if she was also an employee." Id.

Respondent's argument that it acted in good faith is inconsistent. Respondent asserts that it was not "fully aware of the requirement to prepare I-9 Forms until an outside independent contractor brought up another company's problems with employer

sanctions." Respondent's Brief at 2. In contrast, Respondent states, however, that it did not learn of its obligation to complete I-9s until the INS audit in June, 1994. Id. Since Respondent did produce I-9s for some of the employees, it is obvious that it was aware of its § 1324a obligations. Its inconsistent compliance fails to demonstrate good faith. This factor aggravates the civil money penalty.

3. Seriousness of the Violation

Respondent admits that it failed to prepare Forms I-9 for 13 employees as alleged in Count I. "[A] failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious." United States v. Davis Nursery, Inc., 4 OCAHO 694 at 21 (1994) (quoting United States v. Charles C.W. Wu, 3 OCAHO 434 at 2 (1992) (Modification of the Decision and Order of Administrative Law Judge). Accordingly, the civil money penalty for Count I will be aggravated.

Counts II-IV list only failures to complete properly the two sections of the Form I-9. Respondent argues that "these violations have the lowest rank of seriousness" because, for example, they only involved "Respondent's failure to inspect and list a document in Column "C" of Section 2." Respondent's Brief at 3. As previously held, however, "completion of these sections of the I-9 form are critical for deterring hiring illegal aliens." Davis Nursery, 4 OCAHO 694 at 22. Therefore, although not as serious as failure to prepare an I-9, these Counts are nevertheless serious violations and will be aggravated accordingly.

4. Employment of Unauthorized Aliens

The parties agree that this factor should not be used to aggravate the civil money penalty.

5. History of Previous § 1324a Violations

As with the previous factor, the parties agree that this factor should not be used to aggravate the civil money penalty.

6. Effect of Factors Weighed Together

In determining the appropriate level of civil money penalty, I have considered the range of options between the statutory floor and the amounts assessed by INS. While the size of AAC supports a finding on the low end of the scale, the aggravating factors of seriousness and good faith do not support a finding at the statutory minimum. Due to the more serious nature of a violation involving failure to prepare the Form I-9, I adjudge a higher amount than for those violations involving failure to prepare properly the Form I-9. In addition, I make a distinction between violations involving failure to complete only one section of the Form I-9 versus failure to complete both sections.

## III. ULTIMATE FINDINGS, CONCLUSIONS AND ORDER

I have considered the Complaint, the Answer, and the pleadings submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude upon a preponderance of the evidence:

1. That Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing as alleged in the Complaint to comply with the requirements of 8 U.S.C. § 1324a(b)(1), (2) and (3) with respect to the individuals named in Counts I, II, III and IV of the Complaint;

2. That upon consideration of the statutory criteria and other relevant factors used for determining the amount of the penalty for violation of 8 U.S.C. § 1324a(a)(1)(B), it is just and reasonable to require Respondent to pay civil money penalties in the following amounts:

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| Count I, | $300 as to each named individual, | $3,900 |
| Count II, | $200 as to each named individual, | $1,200 |
| Count III, | $200 as to each named individual, | $600 |
| Count IV, | $250 as to each named individual, | $500 |

**For a total of $6,200.**

This Final Decision and Order is the final action of the judge in accordance with 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.52(c)(iv).[1] This Order "shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order. . . ." 8 U.S.C. § 1324a(e)(7).

Any "person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order." 8 U.S.C. § 1324a(e)(8).

SO ORDERED.

Dated and entered this 7th day of June, 1995.

Marvin H. Morse
Administrative Law Judge

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1 See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Final Decision and Order were mailed first class, postage prepaid, this 7th day of June, 1995 addressed as follows:

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